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IN THE SUPREME COURT

OF THE

STATE OF VERMONT

In re Petitions of Vermont Electric Power Company, Inc.

and Green Mountain Power Corporation,

Supreme Court Docket No. 2005-164

Appeals from Public Service Board

Docket No. 6860,

Orders of January 28 and March 11, 2005

BRIEF OF APPELLEE

VERMONT DEPARTMENT OF PUBLIC SERVICE

IN RESPONSE TO THE BRIEF OF THE

MEACH COVE REAL ESTATE TRUST

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STATEMENT OF THE ISSUES

a. Whether most of Meach Cove's claims are properly before the Court, since: (1) Meach Cove failed below to raise its first three claims of error; and (2) as to the second claim of error, there was no final decision below on the order's preclusive effect. (Begins on page 5.)

b. In the alternative, on its first two claims, whether Meach Cove has met its burden to show clear error, since the Board decided that the project as a whole is needed to provide adequate service, without "necessity and adequate service determinations" specific to Meach Cove's land. (Begins on page 9.)

c. In the alternative, on its first two claims, whether Meach Cove has shown that the Board abused its discretion under 30 V.S.A § 248, since the Board conceptually approved the proposed route subject to post-certification review. (Begins on page 14.)

d. In the alternative, whether Meach Cove's second claim is inconsistent with the opportunity to be heard provided below and Meach Cove's assertion of issue preclusion. (Begins on page 23.)

e. In the alternative, on Meach Cove's third claim, whether Meach Cove has met its burden to show that the Board abused its discretion in declining to decide the order's preclusive effect. (Begins on page 24.)

f. On Meach Cove's fourth claim, whether Meach Cove has met its burden to show that the Board abused its discretion in making an affirmative finding on aesthetics. (Begins on page 25.)

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STATEMENT OF THE CASE

The Department of Public Service ("DPS" or the "Department") incorporates the statement of the case from its brief of June 13, 2005 in response to the Towns of Shelburne and New Haven et al. ("the DPS June 13 Brief").

DPS disagrees with and objects to the Meach Cove Real Estate Trust's ("Meach Cove") statement of the case. Meach Cove presents a "concise" 15-page statement which discusses the evidence at length, apparently asking the Court to weigh the evidence differently from the Board. That is not the function of appellate review. In re Petition of Green Mt. Power Corp., 131 Vt. 284, 305 (1973).

Contrary to Meach Cove's statement of the case, the Board determined the general need for this major transmission project to provide Vermonters with reliable service, and made no "necessity" or "adequate service" determinations specific to Meach Cove's land. See Section III below in this brief and citations therein.

The Board also issued a conceptual approval of the project route, determining that it can be constructed without undue adverse impact on aesthetics and the natural environment. This approval is subject to an extensive post-certification process under which the Board will review specific pole heights and locations, corridor clearing width, and aesthetic mitigation measures, with opportunity for parties such as Meach Cove to comment and request a hearing. See Section IV below and citations therein.

In describing the Board's hearings below on design details for selected project areas, Meach Cove omits that the Board held them to inform its overall judgment, with

detailed post-certification review still to occur for the entire project if approved:

> We emphasize as strongly as possible that the designation of these sites is not an indication that these are the only sites that the Board considers to be sensitive, or that will require detailed design plans. *In fact, if the project is approved on an overall basis, the entire proposed route will require such detail for submission and review in post certification proceedings.* However, these sites seem particularly significant in terms of potential "show-stopper" or "ripple effects" on other parts of the proposal. In addition, these specific examples will inform the Board's judgment regarding other sensitive sites.

Meach Cove's PC at 17 (emphasis added).

In discussing the original proposed route through Shelburne's Davis Park neighborhood, Meach Cove fails to tell the Court that experts for the Department and the Town of Shelburne ("Shelburne") testified that this proposal would have an undue adverse effect on aesthetics. NHPC at 124-25; Prefiled Testimony of Henderson-King and Lalley at 11, 15, 29, 33 (Dec. 17, 2003). Similarly, Meach Cove does not acknowledge that an expert for the Agency of Natural Resources ("ANR") testified that the so-called Shelburne Reroute[1] would adversely affect a wetland complex. Department's Further SPC at 4.

SUMMARY OF ARGUMENT

Meach Cove's first three claims are not properly before the Court. It never argued below that the Board had: (a) made "necessity" and "adequate service" determinations allegedly in violation of 30 V.S.A. § 248, (b) precluded Meach Cove from any issues, or (c) promulgated an order that allegedly leads inevitably to condemnation. Moreover, it failed to use the opportunity of its post-decision motion to seek administrative resolution of

[1]In this document, the phrase "Shelburne Reroute" refers to the option described by Shelburne on page four of its brief.

these claims. Separately, Meach Cove cannot maintain its preclusion claim because there was no final decision below on the order's preclusive effect.

In the alternative, for two separate reasons, Meach Cove fails to show clear error on its initial two claims. First, they are founded on the incorrect assertion that the Board made "necessity and adequate service determinations" specific to Meach Cove's land. Instead, the Board decided the general need for the project to assure reliable service.

Second, Meach Cove fails to show that the Board abused its discretion under § 248 in issuing a conceptual approval of the project, including the routing over Meach Cove's land, subject to a post-certification process during which final pole heights and locations, corridor clearing widths, and aesthetic mitigation plans will be decided, and affected parties such as Meach Cove will be able to comment and request a hearing on final designs and seek additional mitigation.

Meach Cove's second claim also fails for the separate reason that it had full and fair opportunity to participate below. Further, because it is based on the doctrine of issue preclusion, Meach Cove's claim is internally inconsistent, because the doctrine does not apply unless (a) there was full and fair opportunity to litigate the issue in a prior action and (b) applying preclusion is otherwise fair.

Again in the alternative, Meach Cove's third claim fails because it has not shown that the Board abused its discretion when it declined to determine the preclusive effect of its order. The Board was not clearly unreasonable in declining to decide what it did not have to decide. Contrary to Meach Cove's arguments, the Board did not err at all in stating

that "[t]here are no condemnation proceedings that arise . . . at this time" from its order to issue a certificate of public good ("CPG"). Shelburne's PC at 4. Nor is such a proceeding as to Meach Cove's land inevitable.

Meach Cove's last claim of error is based on the incorrect assertion that the case of In re Petition of Tom Halnon, 174 Vt. 514 (2002) (mem.), requires that the Board consider alternatives and explain that consideration. Instead, Halnon ruled that the Board did not abuse its discretion in a denial based on aesthetic impacts where the applicant had performed "no analysis" of alternatives. Id. at 517. Applying the abuse of discretion standard to this case, it was not clearly unreasonable for the Board to select the so-called Meach Cove Reroute[2] after hearing testimony that this option would not have an undue adverse effect on aesthetics if recommended mitigation measures were required, and that the Davis Park alternative would have an undue adverse effect on aesthetics and the Shelburne Reroute alternative would adversely affect a wetland complex.

ARGUMENT

I. **Meach Cove faces a significant burden on appeal.**

Meach Cove bears a serious burden in challenging the Board's determinations below. The Department incorporates Section I of the DPS June 13 Brief. DPS emphasizes that: (a) there is a strong presumption that orders issued by the Board are valid and (b) the burden of proving clear error falls to the appealing party. In re East Georgia Cogeneration Ltd. Partnership, 158 Vt. 525, 531-32 (1992).

[2]By "Meach Cove Reroute," DPS means the option described by Shelburne on page five of its brief as further west of the Shelburne Reroute.

For abuse of discretion claims, this Court's standard is deferential, requiring a demonstration "that discretion is exercised on grounds or for reasons *clearly* untenable, or to an extent *clearly* unreasonable." Halnon, 174 Vt. at 517 (emphasis added).

30 V.S.A. § 11(b) requires a similarly deferential standard of review for factual determinations of the Board, stating: "Upon appeal to the supreme court its findings of fact shall be accepted unless clearly erroneous." With respect to the Board's weighing of the evidence, this Court applies a highly deferential standard:

> On review, it is not the function of this Court to require the facts be found in accordance with our view of the evidence, thereby substituting our judgment for the Board. Rather, we will sustain their weighing of the evidence if there is evidence to support it. In this respect, it is not for this Court to review the rightness of the Board's findings; rather it is only for this Court to review the reasonableness of those findings.

Green Mt. Power Corp., 131 Vt. at 305 (1973) (citation omitted).

II. **Meach Cove raises issues that are not properly before the Court.**

A. Meach Cove cannot maintain its first three claimed errors because it did not raise them below.

On appeal, Meach Cove includes claims that it did not raise below. These claims are that the Board: (a) determined that the proposed routing over Meach Cove's land was necessary to provide adequate service, in violation of § 248; (b) predetermined issues that would arise if VELCO sought condemnation of Meach Cove property under 30 V.S.A. § 110 et seq.; and (c) concluded "erroneously" that condemnation proceedings have not arisen from the project's approval.

Meach Cove cannot raise these claims on appeal. Parties may not appeal issues not

raised or decided below:

> Contentions not raised or fairly presented below are not preserved for appeal. . . . The issue must be presented with sufficient specificity and clarity to the give the tribunal a fair chance to rule on it.

In re Vermont Yankee Nuclear Power Station, 2003 VT 53 ¶ 12, 175 Vt. 368, 375 (2003) (citation omitted). Issues not raised before decision are waived if not raised in a post-decision motion. Halnon, 174 Vt. at 516; In re Quechee Lakes Corp., 154 Vt. 543, 552 (1990).

The requirement for appellants clearly to raise issues below is important for two reasons. First, it provides the tribunal with a fair opportunity to make a determination: "In order to effectively raise an objection, a party must present the issue with specificity and clarity in a manner that gives the factfinder a fair opportunity to rule on it." Bull v. Pinkham Engineering Assocs., 170 Vt. 450, 459 (2000).

Second, it encourages the resolution of issues below and therefore potentially avoids appeals. In this regard, in construing preservation requirements with respect to an administrative tribunal, the Court is "guided . . . by the law of exhaustion of administrative remedies." In re Denio, 158 Vt. 230, 234 (1992).

Meach Cove did not argue below that "the Board made both necessity and adequate service determinations" as to Meach Cove's land, thereby (in Meach Cove's view) violating § 248. Meach Cove's Brief at 19. Meach Cove's post-decision motion lacks any assertion that the Board made such determinations specific to Meach Cove's land, even though Meach Cove had before it the language which it now claims evinces such

determinations. Instead, the motion contained two one-sentence requests that the Board modify a finding to incorporate certain mitigation measures and "state" that its order has no preclusive effect on Meach Cove. Meach Cove's PC at 67. Moreover, Meach Cove's proposed findings and reply brief below lack any argument on alleged "necessity and adequate service determinations." Meach Cove's PC at 47-65.

Meach Cove also did not argue below that it "will be precluded from litigating" issues in an eminent domain proceeding. Meach Cove's Brief at 21. Meach Cove never asserted below that it was or would be precluded from anything. Meach Cove's PC at 47-65, 67. Its post-decision motion makes no claim that the Board's CPG and associated order would result in preclusion, even though it had those documents in hand. Instead, the post-decision motion contained a one-sentence request that the Board state that Meach Cove would not be precluded. Id. at 67.[3] The Board declined to state, one way or the other, the order's preclusive effect. Shelburne's PC at 4.

Meach Cove similarly did not claim below that the order would "give rise to a condemnation proceeding." Meach Cove's Brief at 22. It merely stated it "would not consent to the 115 kV line across its property if there was no agreement between VELCO and Meach Cove . . . ." Id. at 23. Meach Cove's own belief that non-consent inevitably leads to condemnation is no substitute for squarely presenting the claim to the Board.

Meach Cove never clearly and specifically raised with the Board the contentions described above, even though it could have done so through post-decision motion under

[3]A one-sentence footnote in Meach Cove's proposed findings similarly requested that the order state it would not have preclusive effect. Meach Cove's PC at 63, n.1.

VRCP 59(e). It never gave the Board a fair opportunity to rule on these arguments. Consequently, Meach Cove waived them for purposes of appeal.

B. Meach Cove may not claim error based on preclusion when there was no final determination below on the order's preclusive effect.

Separate from Meach Cove's failure to raise issues below, it cannot maintain an appeal based on alleged "deprivation" of rights due to preclusion when the Board expressly declined to decide the order's preclusive effect. The Board responded thus to Meach Cove's request to state that the order has no such effect:

> We decline to modify the Order to include language regarding any preclusive effect of the Order on any future eminent domain proceeding involving Meach Cove. There are no condemnation proceedings that arise from our Order at this time. If the issue does arise, parties will then have the opportunity to brief the issue of collateral estoppel as it relates to the Board's Order.

Shelburne's PC at 4. The Board therefore has made no decision that Meach Cove will be precluded from raising any issue.

A final judgment is a prerequisite to appeal. In re Cliffside Leasing Co., 167 Vt. 569, 570 (1997). While the order is final on issuing a CPG, the Board's "ruling in this matter plainly is not a final disposition of the subject matter" of preclusion. Id. In the absence of final judgment, the issue is not ripe for appeal. As the Board stated, Meach Cove may argue *against* preclusion if VELCO petitions to condemn.

Deciding preclusion was not necessary to the decision below, since § 248 does not require that the Board decide preclusive effect in order to issue a CPG. See 30 V.S.A. § 248(a)(3), (b) (requiring PSB to determine project to promote the general good of the state

and make findings before issuing a CPG).

Meach Cove nowhere claims that the Board improperly declined to decide the order's preclusive effect. Instead, its argument is only that the Board erred in stating that its order granting a CPG does not give rise to condemnation proceedings "at this time." Even if this contention were meritorious, it would remain true that below there was no final decision on preclusion or necessity to decide the issue. In the alternative, Meach Cove's claim is not meritorious, as discussed in Section VI of this brief.

III. **In the alternative, Meach Cove's first two claims fail because the Board decided that the overall project is needed to provide adequate service and did not make "necessity and adequate service determinations" specific to Meach Cove's land.**

Meach Cove grounds its first two claims of error on an assertion that the Board made "necessity and adequate service determinations" regarding its land. Meach Cove's Brief at 19-21. As stated above, Meach Cove did not raise these claims below and cannot raise them on appeal. In the alternative, there is a strong presumption that Board orders are valid. East Georgia, 158 Vt. at 531. Meach Cove has not overcome this presumption.

The Board's determinations on "need" relate to the general need for the project to provide reliable service to Vermont, not to specific routing over Meach Cove's land. These determinations are in accordance with Auclair v. Vt. Electric Power Co., Inc., 133 Vt. 22 (1974), which distinguishes the Board's making a planning and policy determination from the "necessity of constructing these lines so as to affect the individual's particular property interests." Id. at 26-7.

The Board determined the general need for the project under § 248(b)(2), which

requires that before issuing a CPG, the Board must find that the proposed "purchase, investment or construction":

> is required to meet the need for present and future demand for service which could not otherwise be provided in a more cost effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including but not limited to those developed pursuant to the provisions of sections 209(d), 218c, and 218(b) of this title . . . .

30 V.S.A. § 248(b)(2). The Board's opening summary of its order reflects that its decision under this criterion was general and not specific to routing. After discussing the important "real-world problem that VELCO's proposal is designed to address," and the inability of non-transmission alternatives to "timely" address that problem, the Board stated: "Thus, we conclude that *some version* of the proposed Project before us is needed." Appellants' SPC at 5-6 (emphasis added).

The Board's findings and conclusions on "need" confirm that it determined the general need for the project. After making the statutory finding required by § 248(b)(2) (Appellants' SPC at 12), the Board issued 107 supporting findings covering 40 pages, with seven pages of additional discussion and conclusions, not one of which mentions Meach Cove. Id. at 12-59. The Board examined the "appropriate standards by which to judge the reliability of *Vermont's* bulk power system" (id. at 17, emphasis added), the nature of the deficiencies on that system, and "*Vermont's* historical and projected peak electrical demand." Id. at 27-28 (emphasis added). It concluded that the project would meet the overall reliability need:

> The proposed Project would meet the need for present and near-future

> demand for service. *The proposed Project would enable the bulk power system to provide reliable service to northwest Vermont (i.e., satisfy the N–2 contingency criterion)* for all double-contingency scenarios up through 1,165 MW, and would provide reliable service up through 1,200 MW for all double-contingency scenarios in which the Highgate converter is the first contingency.

Id. at 37 (emphasis added, footnote omitted).

The Board next compared the project to various transmission-only alternatives and alternative resource configurations. Id. at 39-59. Its conclusions addressed the general need and not specific routing over Meach Cove's land:

> As described in the above findings, the various transmission-only alternatives are inferior to the proposed Project. . . . Doing nothing is not an option at this time, because the proposed 345 kV line would be *necessary at a statewide load level of 1,100 MW*, assuming all other proposed Project upgrades (with the exception of the second phase of the Granite reactive device) are in service. The *1,100 MW statewide load level* is projected to occur within a year or two of the date of this Order . . . .
>
> * * *
>
> Based on the above findings, *we conclude that construction of the proposed Project is the most cost-effective means of meeting the current and future demand for service in northwest Vermont*. No other proposal presented in this case, including the generation, energy efficiency, and load response measures included in the various ARCs, can meet the expected need for service with an appropriate level of reliability in a timely manner. Our decision is influenced by the time constraints VELCO is operating under to improve the reliability of the bulk power system. . . . As the power deficit continues to increase, *Vermonters* would be exposed to more outage-related risks than we find to be acceptable.

Id. at 44, 52 (emphasis added, footnotes omitted).

In an interlocutory order below, the Board stated that its consistent practice is to address the "need" and other economic and least-cost criteria of § 248(b) as a whole and

that it saw no reason to proceed differently in this case:

> In reviewing petitions under Section 248, the Board has consistently addressed the economic and least-cost criteria for the project as a whole, rather than separate components. . . . This approach has been used extensively in the past, as is well documented in the Department's May 12 filing.
>
> We are convinced that this is the correct approach when the petitioner contends, and provides testimony, that a project should be treated as a coordinated whole due to the interconnected nature of the transmission system. There might well be situations where we determine that components of a project should be treated separately, but we decline to do so at this point in these proceedings as there has been testimony that the 345 kV line is an integral portion of the NRP.

NHPC at 329-30.[4] In a footnote, the Board defined the phrase "economic and least-cost criteria" as "30 V.S.A. § 248(b)(2), (4), (6), and (7)." Id. at 320, n. 2.

Meach Cove tries to controvert the broad nature of this determination through two sentences of the order which do not discuss Meach Cove's property. Meach Cove's Brief at 19. The first sentence begins the last paragraph of the Board's summary of the order:

> In sum, as part of our consideration of all factors listed in 30 V.S.A. Sec. 248 (including the incorporation of almost all of Act 250's substantive criteria into that statute), we have examined the necessity for, and the alternatives to, the proposed Project. We have also looked into the impact the proposed Project would have on the natural environment, the health and safety of Vermonters, and the orderly development of the region. We have concluded that the Project, as proposed, would create undue adverse effects, but that, with appropriate conditions, those impacts can be mitigated to a point where they will not be undue. These elements, and others discussed below, lead us to issue a carefully conditioned certificate of public good to the Petitioners.

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[4]Ironically, Meach Cove asserts error through the alleged specific determination of necessity as to its land, while the Town of New Haven et al. claim the Board erred by making a need determination as to the project as a whole.

Appellants' SPC at 7.

No sentence of this paragraph decides that routing over Meach Cove's land is needed to provide adequate service. The paragraph is a summary list of the decisions under the criteria of § 248(b) contained in the findings and conclusions that follow and must be read in the context of those findings and conclusions. As shown above, on "necessity," those findings and conclusions relate to the general reliability need for the project and not to routing over Meach Cove property.

The same applies to the second sentence relied on by Meach Cove, which itself is the second sentence of the following paragraph:

> Third, given these first two conclusions, doing nothing is not an option. This Board has an obligation to ensure that Vermont's electricity consumers receive "adequate service." While the legislature did not define "adequate," we think it is clear that adequacy of electric service is a relative and dynamic standard, such that a level of service that may have been "adequate" in years past might no longer meet that standard today, given the pervasiveness of modern technology in the home and workplace for which electricity is essential.

Id. at 9 (footnote omitted). This paragraph is about the general need to ensure reliable service and says nothing about locating a line on Meach Cove's land.

IV. **In the alternative, on its first two claims, Meach Cove fails to meet its burden to show clear error or any error with respect to the Board's alleged "violation" of 30 V.S.A. § 248.**

Meach Cove bases its first two claims of error in part on a contention that the Board violated § 248 by setting a route over its land. Meach Cove's Brief at 16, 20-22. As stated above, Meach Cove failed to raise these claims below and cannot raise them now. In the alternative, the claims fail for the separate reason that the Board conceptually

approved a route over Meach Cove's land subject to post-certification review.[5]

A. The Board issued a conceptual approval of the project, including the Meach Cove routing, subject to post-certification review.

The decisions below on aesthetics, natural resources and other site specific impacts of the project, including the routing over Meach Cove's land, are conceptual approvals that a route can be constructed in the proposed locations that will meet the relevant § 248(b) criteria. They are subject to conditions requiring implementation of aesthetic mitigation and scrutiny of final design plans during an extensive process of post-certification review that will evaluate specific pole locations and heights, clearing widths, and planting proposals, with opportunity for Meach Cove to comment and request a hearing. The Board stated:

> The evidence presented in this Docket has convinced us that the proposed Project *can be constructed*, with the alterations required by this Order, without undue adverse impacts on Vermont's natural and built environment and without presenting a risk to Vermonters' health and safety.

Appellants' SPC at 225 (emphasis added). See also id. at 78-9. The Board found concerning aesthetics: "The proposed Project, *with the modifications and conditions required in this Order*, will not have an undue adverse effect on the scenic or natural beauty of the area." Id. at 81 (emphasis added). The Board's CPG was "subject to the following conditions," among others:

1. Petitioners shall file, for the Board's approval, final construction plans

[5]Meach Cove's argument that the Board erred in selecting a route over its property contrasts with Shelburne's claim that the Board did not do so. If Shelburne were right about the order (which DPS disputes), Meach Cove's claims would necessarily fail and, as argued in the DPS June 13 Brief at 8-9, Shelburne's claim also would fail.

for the 345 kV line, 115 kV line, and the substation upgrades, *concurrent with plans for aesthetic and environmental mitigation, as required by the post-certification process described in the Order*. *Petitioners may commence construction only after receiving approval for such plans, and receipt of all necessary permits.*

2. For the post-certification review process, Petitioners shall take the following actions:

* * *

- Petitioners shall file all design detail construction plans, with associated environmental mitigation measures, as identified in Section XII of the Order, with the Board, affected parties, affected municipal governments, and affected local and regional planning commissions.

- Petitioners shall file a list of all required permits, and the issuing agency, with the Board and the parties.

- Petitioners shall file all required permits with the Board and the parties.

* * *

- In its [sic] filings, Petitioners shall demonstrate that it [sic] has given *careful consideration* to all measures, as identified in Section V.B of the Order, for mitigation of adverse aesthetic impacts.

3. Petitioners shall file a schedule within two months of the Order identifying the permits, plans, and reports required for post-certification review and identifying the date upon which each permit, plan, or report shall be filed. The schedule shall include dates by which the Petitioners would file the information set forth in paragraph 2, above, for each section of transmission line and for each substation.

Id. at 245-46 (emphasis added). The Board stated that "the Plans filed shall include":

- the *location, height, and design* (e.g., H-frame, delta configuration) *of each transmission structure*, and the span length between structures;

- the *amount of clearing required* for the right-of-way;

- *aesthetic mitigation measures*, including proposed plantings, height, species, number, growth rate, and whether berms will be used;
- *areas where the Board has determined that the proposed Project will result in an adverse aesthetic impact*;
- *historic properties that have been identified by the Board as adversely affected*;
- *environmental mitigation measures, including erosion control*;
- the location of underbuild; and
- the height and footprint of all structures within substations.

Id. at 217-18 (emphasis added).

The mandated post-certification review requires that, in preparing final plans for filing with the Board, VELCO must consult with affected parties, landowners and local and regional governments. Id. at 139, 217. Once VELCO submits plans to the Board, all of these entities will have an opportunity to file comments and request a site visit with Board staff and/or a hearing. Id. at 217-18. The Board stated: "Additional mitigation measures may be required, if justified in specific post-certification reviews." Id. at 6.

The Board made its decisions subject to extensive post-certification review because it had determined to issue a conceptual approval. It stated:

> In this Order, as in past Section 248 orders, we are approving the proposed Project conditional upon Petitioners filing certain information subsequent to their receipt of a CPG and prior to construction. . . .
>
> The Board must weigh three competing interests in determining the timing and the detail of the information required from the petitioner. The first consideration is the Board's "duty under Vermont law to make affirmative

> findings, based upon the evidentiary record, on each of the statutory criteria." [Footnote citation omitted.] The second is the cost to Vermont ratepayers of requiring construction-level design detail early in the regulatory process. The third consideration is ensuring that the public and parties are provided with adequate notice.
>
> Pursuant to Section 248, the Board is required to make positive findings on a wide range of criteria. Certain criteria, such as Section 248(b)(2), can be analyzed without reference to the site-specific aspects of the project, while the analysis of others, such as the Act 250 criteria incorporated under Section 248(b)(5), requires the introduction of site-specific evidence. *There is sufficient evidence to conclude that the Petitioners will be able to construct the proposed Project in a manner that will not create an undue adverse impact under any of the relevant criteria. The post-certification process ensures that construction of the project will occur in a manner consistent with this conclusion.*
>
> * * *
>
> *It is sufficient to determine that a route is possible* without requiring the petitioner (and the ratepayer) to incur the substantial costs of creating detailed plans without any certainty that the proposed Project would receive a certificate of public good. *It is during the post-certification process that Petitioners will be required to provide detailed construction plans for the entire proposed Project.*

Id. at 214-15 (emphasis added).

As with all of the project, the Board's approval of the route over the Meach Cove land is a conceptual one that is subject to the foregoing post-certification review. Appellants' SPC at 245. In this area, the Board did not approve specific pole placements and heights, areas to be cleared or plantings. Instead, the Board required mitigation measures at a conceptual level that depends on subsequent design and review:

> 317. While the 115 kV line as proposed in the area of the Bostwick Road bridge crossing and the Meach Cove Trust property will result in an adverse aesthetic impact, *the impact will not be undue if the following mitigation measures are taken*: *careful pole placement; lower pole heights; retention of as much vegetation at the edge of corridor as*

possible; and plantings. Raphael DD pf. at 12; exh. DPS-DR-1 at 26–27.

* * *

319. *Tree retention should be maximized in this area, with exceptions made, if necessary, to standard practice for right-of-way clearing width and the removal of critical buffering trees*. A qualified arborist should assess the health of the trees. Tree removal should be limited to diseased or otherwise compromised trees. If necessary, critical screen trees should be cabled or guyed (rather than removed) to keep them from falling onto the conductors. *VELCO also should assess the planting of a "vegetative plug" or screening at Meach Cove Road's east side at Bostwick Road.* Raphael DD pf. at 11.

* * *

For the reasons stated in the above findings, the 115 kV line must incorporate the mitigation measures described in Findings 317 and 319 to avoid an undue adverse aesthetic impact.

VELCO should continue discussions with the Meach Cove Trust representatives regarding the appropriate clearing and mitigation in this sensitive location. Representatives from the Town of Shelburne should be included in the discussions.

* * *

320. *Lower pole heights* for the 115 kV line in this area would reduce the visual impacts from Shelburne Museum and Shelburne Farms. Boyle reb. pf. at 17.

* * *

For the reasons stated in the above findings, the 115 kV line must incorporate the mitigation measures described in Finding 320 to avoid an undue adverse aesthetic impact. *This section of the 115 kV line is sufficiently sensitive that it must be planned on paper at a design detail level, and then confirmed in the field by a method of testing actual proposed pole locations to ensure that existing screening is used to the greatest effect possible. Existing vegetative screening must remain to the fullest extent possible.*

Id. at 120-21 (emphasis added).

The provisions cited by Meach Cove on this issue complement rather than contradict the Board's conceptual approval. For example, Condition 6 of the CPG states: "Construction, operation, and maintenance of the proposed Project shall be in accordance with the *findings and requirements* set forth in this Order." Appellants' SPC at 227; see Meach Cove's Brief at 19-20. As demonstrated above, the referenced *findings*, conceptually determine that the route "can be constructed" in accordance with the § 248(b) criteria and state general mitigation steps that require further development and implementation, all subject to the *requirement* for post-certification review of final designs, including the specifics of pole height and location, corridor clearing width, and aesthetic mitigation plantings.

Similarly, the opening paragraph of Appendix D, the Board's "Detailed Project Description," contains the language: "The Project as approved is *subject to the modifications and conditions* set forth in today's Order." Appellants' SPC at 241; see Meach Cove's Brief at 1. As demonstrated above, those *modifications* – in the form of aesthetic mitigation for the Meach Cove area – are broadly and conceptually stated, and the *conditions* of the order require an extensive post-certification review which will determine the specifics.

B. Meach Cove fails to show abuse of discretion or any error under § 248 with respect to the Board's conceptual approval.

Section 248 does not state whether the Board may certify a general route followed by post-certification review or restrict the Board to or from using that procedure. Instead, § 248 requires that the Board make findings on various issues and imposes requirements

pertaining to technical and nontechnical hearings. 30 V.S.A. § 248(a)(3), (a)(4), (b). Within the general contested case requirements of Vermont's Administrative Procedure Act, the specific conduct of the proceeding is left to the Board's discretion to control the order of its business. 3 V.S.A. Chapter 25; In re Green Mountain Power Corp., 147 Vt. 509, 516 (1986).

The Court previously affirmed the Board's discretion under § 248 to issue a general route approval followed by review of specific designs in post-certification proceedings. In re Vt. Electric Power Co., Inc., 131 Vt. 427, 434-35 (1973). The Court's basis was not that § 248 requires the Board to use such a procedure but that the practice is not prohibited: "In making the argument that 30 V.S.A. § 248 requires the Board to certify a specific route, the appellants overlook the fact that nowhere in the statute is the procedure employed by the Board prohibited." Id. at 434.

In upholding the procedure, the Court cited the practicality of avoiding the cost of preparing detailed plans for all alternatives before approval and the use of a post-certification procedure that "affords the parties an opportunity to comment to the Board on the plans submitted by VELCO, and further hearing is not precluded should a comment be made that warrants a hearing." Id. at 434-35.

The Court sustains the Board's exercise of discretion unless it is clearly unreasonable or untenable. Halnon, 174 Vt. at 517.

Meach Cove fails to demonstrate that the Board's use of discretion under § 248 was clearly unreasonable or untenable or in any way violated that statute. The Board

approved a route generally over Meach Cove's property, including the so-called Meach Cove Reroute, subject to review of the specific pole locations and heights, corridor clearing widths, and aesthetic mitigation plans. The Board's process provides Meach Cove with an opportunity to review and comment on the final plans and request a hearing. Meach Cove therefore can continue to seek the pole heights and placements, corridor width, and plantings it believes appropriate.

These procedures are not different from those upheld in Vt. Electric Power Co., Inc., 131 Vt. at 434-35: The Board certified a general route subject to post-certification procedures in which affected parties were able to file comments on plans and request a hearing. Further, the Court previously upheld the Board's considering "the route over appellees' land as the one most conducive to the public good" where it made a general determination subject to such post-certification review. Auclair, 133 Vt. at 28.

In the alternative, the Board would not have abused its discretion under § 248 even if it were more specific as to the route over Meach Cove's land than contemplated under the procedures upheld in Vt. Electric Power Co., Inc. and its progeny. Just as that case notes that § 248 does not prohibit the post-certification procedure, neither does § 248 prohibit deciding specifics before issuing a CPG. 30 V.S.A. § 248; Vt. Electric Power Co., Inc. 131 Vt. at 434. That case and later cases also state no such bar. Id. at 434-5; Auclair v. Vt. Elec. Power Co., Inc., 132 Vt. 519, 521 (1974); Auclair, 133 Vt. at 26-28; Vt. Electric Power Co. v. Bandel, 135 Vt. 141, 145 (1977).

Greater specificity at the CPG stage would be consonant with the statute. As stated

earlier, below the Board considered § 248's requirement to make findings on each of the statutory criteria, noting that the analysis of many the aesthetic and natural resource criteria "such as the Act 250 criteria incorporated under Section 248(b)(5), requires the introduction of site-specific evidence." Appellants' SPC at 214; see 30 V.S.A. § 248(b)(5), 10 V.S.A. § 6086(a)(1)-(8), (9)(K). Facility placement can make a significant difference in its effect on the relevant view, wetland, or other protected resource. Therefore, greater specificity conduces rather than contradicts the requirements of § 248 and would not be clearly unreasonable at the time a CPG is issued.

In any case, since § 248(b) requires findings that depend on site-specific evidence, the Board cannot wait until a condemnation proceeding to make specific determinations. To comply with the statute, it must do so in a § 248 case either at the time it issues a CPG or in the post-certification phase. In this regard, a condemnation proceeding may not occur, either because the applicant and landowner reach agreement, or the applicant already owns the proposed locations, such as the right-of-way for the approved 345 kV line (Appellants' SPC at 84). Any requirement that specific determinations must be made in condemnation proceedings would therefore contravene the legislative intent to protect aesthetic and natural resources in accordance with § 248(b) and incorporated statutes. See, e.g., 30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)-(8), (9)(K).

V. **In the alternative, Meach Cove had and will have full and fair opportunity to be heard below.**

As stated earlier, Meach Cove failed to raise the "deprivation of rights" claim below and cannot raise it now. In the alternative, the claim fails for two separate reasons.

First, the Board provided Meach Cove with full and fair opportunity to be heard. Meach Cove had the opportunity to file, and did file prefiled direct testimony, surrebuttal testimony and "design detail" testimony. Meach Cove's PC at 68, 93, 96. It had the opportunity to file, and did file, proposed findings fact and conclusions of law, a reply brief, and a motion to alter or amend. Id. at 47, 65, 66. It had the opportunity for cross-examination. See, e.g., Meach Cove's Brief at 22 (Meach Cove's counsel present during examination of VELCO witness Dunn). As discussed above, Meach Cove will have further opportunity during post-certification review to comment and request a hearing on final design plans, including all the design issues it states are of concern: pole heights and locations, clearing width, and mitigation plantings.

Second, Meach Cove cannot base a case for erroneous deprivation of rights on issue preclusion, because such preclusion only applies where full and fair opportunity to litigate the issue occurred and preclusion is otherwise fair. To support its claim, Meach Cove cites In re Tariff Filing of Central Vermont Public Service Corp., 172 Vt. 14 (2001) and states that it "will be precluded from litigating" issues in a condemnation proceeding. Meach Cove's Brief at 22. By asserting that issues will be precluded, Meach Cove necessarily concedes all of the elements of issue preclusion or collateral estoppel. Two of those elements are that "(4) there was a *full and fair* opportunity to litigate the issue in a prior action; and (5) *applying preclusion is fair*." Id. at 20 (emphasis added).

VI. **In the alternative, the Board did not abuse its discretion in declining to state the preclusive effect, if any, of its order on condemnation proceedings.**

As stated earlier, Meach Cove failed to raise below its claim that the order leads

to an eminent domain petition and cannot raise it now. In the alternative, the claim fails because Meach Cove has not met its burden to show that the Board abused its discretion in declining to state the preclusive effect of its order.

The Board's decision was not clearly unreasonable. It properly declined to decide an issue it did not have to decide in order to issue a CPG. 30 V.S.A. § 248(a)(3), (b). Further, the context of a condemnation proceeding will sharpen any decision on preclusion through the specific facts and circumstances relating to the condemnation.

Meach Cove fails to establish clear error by asserting that the order will lead to condemnation proceedings if Meach Cove does not consent to the routing over its land. This assertion does not actually challenge the accuracy of the Board's statement in its order on post-decision motions that "at this time" no condemnation proceedings had arisen from the prior order approving the project. Meach Cove points to no condemnation petition that had been filed at that time.

The assertion also is not true. Non-consent by Meach Cove will present VELCO with the choice of filing a petition for condemnation under 30 V.S.A. § 111(a) *or* selecting a different route and filing a petition under § 248 to amend the CPG to approve such route. The Board's order on post-decision motions acknowledges the general possibility that VELCO may have to seek amendment. Shelburne's PC at 12. A condemnation proceeding involving Meach Cove is therefore not inevitable.

VII. **Meach Cove's argument based on the Halnon case fails to show that the Board abused its discretion.**

Meach Cove erroneously asserts that the Halnon case requires that, to make an

affirmative finding on aesthetics, the Board must consider alternative sites and explain that consideration. Halnon does not state the proof required to make an affirmative finding on aesthetics or the detail required to be in a decision below, and for these reasons alone Meach Cove's claim fails.[6] Instead, Halnon determines that the Board did not abuse its discretion in denying a § 248 application on aesthetic grounds because the applicant presented "no analysis" of alternative sites. Halnon, 174 Vt. at 517.

Applying the abuse of discretion standard used in Halnon, Meach Cove fails to show clear error. The Board chose the so-called Meach Cove Reroute based on the evidence before it, which in contrast to Halnon's "no analysis" included significant testimony on alternatives. Specifically, the Petitioners initially proposed to construct the proposed 115 kV line in the existing corridor through Shelburne's Davis Park neighborhood. See, e.g., Meach Cove's PC at 80, 304-05. However, experts for both DPS and Shelburne testified that, as proposed, the project in this area would have an undue adverse effect on aesthetics. NHPC at 124-25; Prefiled Testimony of Henderson-King and Lalley at 11, 15, 29, 33 (Dec. 17, 2003). DPS witness David Raphael stated:

> It is important to note that from Mile 21.0 to Mile 24.0, the corridor is located in a densely developed area with many residences, a school, a park, open space and other land uses.
>
> Serious impacts will accrue from higher poles and additional clearing

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[6]DPS incorporates pages 10-14 and 26-27 from the DPS June 13 Brief on the adequacy of the Board's explanation and the Halnon case. As stated there, detailing a Quechee analysis for over 60 miles of transmission line and a dozen substations would be a burdensome task not required by statute. The task would be even more burdensome if the Board had to detail consideration of alternatives for all project areas, which it would have to do under Meach Cove's argument.

> required in the vicinity of Heritage and Fletcher Lanes and the road just to the north as well. The increase in pole height, the resultant loss of existing mature vegetation and the lack of sufficient mitigation measures in this area all combine to suggest an undue adverse finding. The change is substantive enough to offend not just the residents, but a reasonable average person observing the before and after conditions.

NHPC at 124.

Faced with this testimony, VELCO proposed an alternative known as the Shelburne Reroute, under which the line would run west, away from the existing corridor and the densely developed neighborhood. Petitioners' PC at 356-57. However, because this route would traverse a wetland complex, ANR testified that VELCO should move the line even further west:

> As initially proposed this is the change about which I had the greatest concern. The McCabe Brook wetland complex is valuable for several values and functions, including water quality protection, floodwater and stormwater storage, wildlife habitat, and erosion control. I should also note that, having spent time in discussion with wildlife biologist John Austin, this is an excellent deer wintering habitat. Any possible measures to avoid impacts to this wetland are to be taken. John Austin and I have recommended to VELCO that the poles be sited west of the wetland complex, perhaps on the ledge. This is a more suitable place as the wetland will not be impacted and, if placed along the agricultural field, the line will be screened by trees.

Supp. Direct Testimony of Alan Quackenbush, Department's Further SPC at 4.

In response, VELCO proposed a further option, the Meach Cove Reroute, which would be out of the densely developed area *and* the wetland complex. Department's SPC at 12-14; see also Meach Cove's PC at 80.

It was reasonable for the Board to select the Meach Cove Reroute given the alternatives before it and the testimony on each. The Board was persuaded that the Meach

Cove Reroute would not have an undue adverse effect on aesthetics if it required recommended mitigation measures. Appellants' SPC at 121-22. In contrast, the Board heard testimony that the Davis Park route would have an undue adverse effect on aesthetics and the Shelburne Reroute would adversely affect a wetland complex.

Meach Cove disagrees with the Board's selection, contending that the Petitioners' testimony showed that "the line through Davis Park complied with the Section 248 criteria." Meach Cove's Brief at 24. But the Board was not required to believe that testimony. In re Wildlife Wonderland, Inc., 133 Vt. 507, 511 (1975). Further, a party's disagreement is not a sufficient basis for this Court to conclude that the Board was clearly unreasonable: "It is not for this Court to review the rightness of the Board's findings; rather it is only for this Court to review the reasonableness of those findings." Green Mt. Power Corp., 131 Vt. at 305.

CONCLUSION

Based on the foregoing, the Court should affirm the Board's decision below.

Dated at Montpelier, Vermont this 23rd day of June, 2005.

Respectfully submitted,

VERMONT DEPARTMENT OF PUBLIC SERVICE

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Aaron Adler, Special Counsel